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7
8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 B. DAVID MEHMET,

13 Plaintiff,

14 v.

15 PAYPAL, INC.,

16 Defendant.
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Case No. 5:08-cv-01961-RMW

**DEFENDANT PAYPAL, INC.'S NOTICE OF
MOTION AND MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(B)(6)
AND 9(B); MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

DATE: September 26, 2008
TIME: 9:00 a.m.
CTRM: 6, 4th Floor
JUDGE: Hon. Ronald M. Whyte

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 26, 2008, at 9:00 a.m., in Courtroom 6, Fourth Floor, of the above-entitled Court, located at 280 South 1st Street, San Jose, California, Defendant PayPal, Inc. ("PayPal") will and hereby does move the Court for an order dismissing First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Causes of Action of Plaintiff B. David Mehmet's ("Plaintiff") Verified Amended Complaint ("Complaint" or "AC") for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b).

PayPal makes this Motion based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the [Proposed] Order Granting Motion to Dismiss, the Declaration of Oleg Cross, any oral argument, and such other matters as the Court deems necessary or appropriate. In addition, PayPal makes this motion following conferences by parties that took place on August 12 and 20, 2008 regarding the noticed hearing date pursuant to the San Jose Division Standing Order Regarding Case Management in Civil Cases.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND PROCEDURAL HISTORY.

A. Introduction.

Plaintiff alleges several misrepresentation and fraud-related claims based on alleged misstatements in PayPal's User Agreement (the operative contract between the parties) and fraudulent concealment of so-called "false positives" allegedly produced by PayPal's fraud detection system. Further, Plaintiff asserts claims for conversion and tortious interference with a business relationship based on PayPal's act of suspending his money transfers to another user, Eric Anderson. In addition, Plaintiff alleges defamation causes of action based on an e-mail sent by PayPal to Anderson, allegedly accusing Plaintiff of fraud.

However, eight out of Plaintiff's eleven claims are legally insufficient (on the face of the Complaint) and should be dismissed.¹ Specifically, Plaintiff's fraud-related claims are deficient,

¹ This motion challenges the following claims: Fraudulent Misrepresentation (First Cause of Action), Fraudulent Concealment (Second Cause of Action), Fraudulent Inducement (Third Cause of Action), Negligent Misrepresentation (Fourth Cause of Action), Conversion (Seventh Cause of Action), Tortious Interference with Business Relationship (Eighth Cause of Action),

as Plaintiff fails to plead the alleged fraud or misrepresentations with particularity as required by Rule 9(b). Furthermore, Plaintiff's remaining claims are legally insufficient because Plaintiff fails to allege: (a) any specific misrepresentation, and (b) damages.

B. Procedural History.

On April 14, 2008, Plaintiff filed his original complaint. On May 19, 2008, PayPal filed a motion to dismiss for lack of subject-matter jurisdiction. On May 27, 2008, Plaintiff filed an opposition, and contemporaneously with it, an amended complaint and a cross-motion for partial summary judgment on his claims for defamation (Fifth Cause of Action) and defamation per se (Sixth Cause of Action). On August 12, 2008, the Court denied both motions. (August 12, 2008 Order, Doc. No. 26, hereinafter "Order.")

II. APPLICABLE LEGAL STANDARDS

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal of a claim that either lacks a cognizable legal theory or where plaintiff alleges insufficient facts to support it. *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). As the Supreme Court recently emphasized, "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not" survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965-66 (2007).

In addition, a plaintiff alleging fraud must satisfy a heightened pleading standard that requires circumstances constituting fraud be pled with particularity under Fed. R. Civ. P. 9(b). Specifically, "[t]he pleadings must state precisely the time, place, and nature of the misleading statements, misrepresentations, and specific acts of fraud." *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994), *cert. denied*, 516 U.S. 810 (1995); *Odom v. Microsoft Corp.*, 486 F.3d 541, 553-554 (9th Cir. 2007). Furthermore, a plaintiff seeking to satisfy Rule 9(b) must "set forth an explanation as to why the statement or omission complained of was false and misleading." *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994); *see Fecht v. Price Co.*, 70 F.3d

Unlawful, Unfair and Fraudulent Business Practices in Violation of Cal. Bus. & Prof. Code § 17200 (Tenth Cause of Action), and Racketeering in violation of 18 U.S.C. § 1961 ("RICO") (Eleventh Causes of Action).

1078, 1082 (9th Cir. 1995), *cert. denied*, 517 U.S. 1136 (1996).

III. ARGUMENT

A. Plaintiff's Fraud-Based Claims (First, Second, and Third Causes of Action) Should be Dismissed.

1. Plaintiff's Fraud-Based Claims Fail to Plead Fraud with Particularity.

It is well established that fraud-based claims are subject to the heightened pleading requirements of Rule 9(b). *See Walling v. Beverly Enters.*, 476 F.2d 393, 397 (9th Cir. 1973) (alleging in conclusory fashion that defendant's conduct was fraudulent was not sufficient under Rule 9(b)); *Meridian Project Sys., Inc. v. Hardin Constr. Co., LLC*, 404 F. Supp. 2d 1214, 1219 (E.D. Cal. 2005) ("It is well settled in the Ninth Circuit that misrepresentation claims are a species of fraud, which must meet Rule 9(b)'s particularity requirement.").

Plaintiff alleges three fraud-based claims for relief (Causes of Action I-III for: "Fraudulent Misrepresentation," "Fraudulent Concealment," and "Fraudulent Inducement") based on the same alleged conduct. Specifically, Plaintiff alleges (in all three claims) that PayPal fraudulently misrepresented in its User Agreement that it "would not interfere" with Plaintiff's money transfers "without good cause." (AC ¶¶ 114-117, 132-133, 135, 137, 141-142). Further, Plaintiff alleges (similarly, in all three of his claims) that PayPal concealed or misrepresented the existence of the alleged "false positives." (AC ¶¶ 126, 127, 134, 135, 143, 148, 149.) These claims are entirely without merit. As an initial matter, PayPal's User Agreement – a judicially noticeable document admittedly executed by Plaintiff (AC ¶ 58) – does not contain any such statements regarding not interfering with transfers "without good cause."²

To the contrary, the User Agreement states, in relevant parts, that if any user engages in a Restricted Activity³ (defined in Section 9.1 to include, among other things, having "negative balance" on one's account (Section 9.1.n.)), PayPal may, among other things: (a) "close, suspend, or limit" that user's access to its account, including that user's "ability to send money"

² This Court has already found that "it is appropriate that the court take judicial notice of" PayPal's User Agreement. (Order at 4.) PayPal renews its request for judicial notice of that document (Doc. No. 21-2 and 21-3) in support of this motion. (See Order at 4) (citing *United States v. Richie*, 342 F.3d 903, 902 (9th Cir. 2003).

³ (See AC ¶ 60.)

(Section 10.2.a.); (b) “contact buyers” and “warn other Users . . . or impacted third parties of [that user’s] actions” (Section 10.2.b.); (c) “refuse to provide [its] services [to that user] in the future” (Section 10.2.d.); or (d) “hold [such user’s] funds for up to 180 days if reasonably needed to protect against the risk of liability.” (Section 10.2.e.). At the time PayPal suspended Plaintiff’s transfer, Plaintiff admittedly owed PayPal \$695.00 on a previously-established, delinquent account. (AC ¶ 88.) Therefore, Plaintiff’s claim that PayPal tricked him (through some misrepresentation) into using its services, and then improperly suspended his money transfer is wrong. More importantly, Plaintiff has failed to identify any supposed false statement in PayPal’s User Agreement.

Similarly, although Plaintiff complains vaguely about concealment and misrepresentation with respect to the alleged “false positives,” he does not identify a single supposedly untrue statement made by PayPal to Plaintiff in its User Agreement (or elsewhere). (AC ¶¶ 126, 127, 134, 135, 143.) Accordingly, Plaintiff has failed to allege a cognizable false statement that induced him to use PayPal’s services or any misrepresentation. A claim that alleges misrepresentation, but “does not identify any specific misrepresentations” is insufficient under Rule 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003); *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004) (affirming dismissal of fraud claim under Rule 9(b) where plaintiff failed to allege specific content of the allegedly fraudulent statement).⁴

In sum, Plaintiff’s non-particularized pleading (plainly contradicted by judicially noticeable facts) falls short of meeting the requirements of Rule 9(b), requiring dismissal of his fraud-based claims. *See Mazur v. eBay Inc.*, No. C 07-03967-MHP, slip. op., 2008 WL 618988, at *13-*14 (N.D. Cal. July 25, 2008) (Patel, J.) (dismissing fraud-based claims for lack of

⁴ Plaintiff’s “bare allegation of ‘fraudulent concealment’ is but a conclusion of law which falls far short of the particularity of statement required by Rule 9(b).” *Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 209 (9th Cir. 1950); *Oestreicher v. Alienware Corp.*, 544 F. Supp. 2d 964, 974 (N.D. Cal. 2008) (holding that “[t]he heightened pleading requirements of Rule 9(b) were designed to avoid exactly” such non-particularized and conclusory pleading of fraudulent concealment); *see also Moore v. Kayport Package Express, Inc.*, 885 F.2d 531 (9th Cir. 1989) (Rule 9(b) applies to “all averments of fraud,” including allegations of fraudulent concealment).

1 particularity under Rule 9(b)).

2 **2. Plaintiff's Fraudulent Misrepresentation Claims (First, Second and**
 3 **Third Causes of Action) Should Be Dismissed Because Plaintiff Has**
 Not Sufficiently Alleged Damages.

4 In California, the elements of fraudulent or intentional misrepresentation are: "[1]
 5 misrepresentation, [2] made with knowledge of its falsity and [3] with an intent to defraud or
 6 induce reliance, [4] justifiable reliance, and **[5] resulting damage.**" *R & B Auto Center, Inc. v.*
 7 *Farmers Group, Inc.*, 140 Cal. App. 4th 327, 377 (Cal. Ct. App. 2006) (emphasis added); *see*
 8 *also Lim v. The TV Corp. Internat.*, 99 Cal. App. 4th 684, 694 (Cal. Ct. App. 2002). Aside from
 9 the lack of particularity noted above, Plaintiff is not alleged to have suffered any damages as a
 10 result of the alleged misrepresentations. (AC ¶¶ 114-117.) Although Plaintiff asserts that he
 11 suffered "general and special damages," (AC ¶ 129) the Complaint itself makes clear that
 12 Plaintiff has not suffered any cognizable and recoverable damages, as discussed below.

13 **First**, Plaintiff concedes that PayPal returned to him the funds that PayPal temporarily
 14 suspended (AC ¶ 24). **Second**, Plaintiff admittedly waived the right to any interest earned on the
 15 funds PayPal handled for him by executing PayPal's User Agreement.⁵ (AC ¶ 58.) **Finally**, as
 16 this Court has already determined, Plaintiff may not recover any alleged consequential damages
 17 or lost profits, as the limitation of liability contained PayPal's User Agreement "preclude[s]
 18 recovery of any lost profits or opportunities arising from Mr. Mehmet's use of PayPal's services."
 19 (Order at 5-6.) Accordingly, Plaintiff has not alleged recoverable damages. *See* Cal. Civ. Code.
 20 § 1709 (listing damages as an element of "fraudulent deceit"); *Conrad v. Bank of Am.*, 45 Cal.
 21 App. 4th 133, 159 (Cal. Ct. App. 1996) ("Misrepresentation. . . does not support a cause of action
 22

23 ⁵ Specifically, Section 5.2 of that User Agreement states:

24 ***You agree that you will not receive interest*** or other earnings on the funds
 25 that Paypal handles as your agent and places in Pooled Accounts. In
 26 consideration for your user of [PayPal's] Service, ***you irrevocably transfer***
 27 ***and assign to PayPal any ownership right that you have in any interest***
 that may accrue on funds held in Pooled Accounts.

28 (Doc. No. 21-3) (Request for Judicial Notice ("RJN"), Ex. A at 6.) (Emphasis added).

1 unless the plaintiff suffered consequential damages. And the damages suffered must be referable
 2 to, and caused by, the fraud.”), *rev’d in part on other grounds by Lovejoy v. AT&T Corp.*, 92 Cal.
 3 App. 4th 85, 92 (Cal. Ct. App. 2001); *see Abbot v. Stevens*, 133 Cal. App. 2d 242, 247 (1955)
 4 (“Fraudulent representations which work no damage cannot give rise to an action at law. . . .”)
 5 (internal citation omitted).

6 Similarly, Plaintiff’s second cause of action for “fraudulent concealment” fails. (AC ¶¶
 7 131-139.) In California, “the elements of an action for fraud and deceit based on concealment
 8 are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must
 9 have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have
 10 intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the
 11 plaintiff must have been unaware of the fact and would not have acted as he did if he had known
 12 of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the
 13 fact, **the plaintiff must have sustained damage.**” *Lovejoy v. AT&T Corp.*, 119 Cal. App. 4th 151,
 14 158 (Cal. Ct. App. 2004) (emphasis added) (citing *Marketing West, Inc. v. Sanyo Fisher (USA)*
 15 *Corp.*, 6 Cal. App. 4th 603, 612–613 (1992).) As already discussed, Plaintiff has not sufficiently
 16 alleged any damages as a result of any alleged misrepresentation or concealment, requiring
 17 dismissal of this claim. *See Lovejoy*, 119 Cal. App. 4th at 158.

18 Plaintiff also asserts a claim for fraudulent inducement. (AC ¶¶ 140-146.) In California,
 19 the elements of fraudulent inducement are: 1) misrepresentation or concealment of a material fact,
 20 (2) knowledge of the falsity of the fact or lack of reasonable grounds for believing it to be true,
 21 (3) an intent to induce reliance, (4) justifiable reliance and (5) **resulting damages**. *See*
 22 *Garamendi v. Golden Eagle Ins. Co.*, 128 Cal. App. 4th 452, 470 (Cal. Ct. App. 2005) (citing
 23 *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996)). Once again, as already discussed in
 24 Section III.A.2., *supra*, Plaintiff has not sufficiently alleged any facts showing damages as a
 25 result of any alleged misrepresentation or concealment, requiring dismissal. *See Garamendi*, 128
 26 Cal. App. 4th at 470.

B. Plaintiff's Negligent Misrepresentation Claim (Fourth Cause of Action) Should Be Dismissed Because Plaintiff Has Not Sufficiently Alleged a Specific Misrepresentation and Damages.

Plaintiff asserts a claim for negligent misrepresentation based on the same alleged conduct as his fraudulent misrepresentation and inducement claims. (*Compare* AC ¶¶ 113-130 *with* AC ¶¶ 147-154; *see also* Order at 3.) In California, the elements of negligent misrepresentation are: "(1) the *misrepresentation of a past or existing material fact*, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) *resulting damage*." *Apollo Capital Fund LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (Cal. Ct. App. 2007); *Shamsian v. Atlantic Richfield Co.*, 107 Cal. App. 4th 967, 983 (2003). As shown in Sections III.A.1.-2., *supra*, Plaintiff has failed to allege a specific misrepresentation by PayPal or damages sustained by Plaintiff. Accordingly, this claim should also be dismissed. *See Apollo*, 158 Cal. App. 4th at 243.

C. Plaintiff's Conversion Claim (Seventh Cause of Action) Should Be Dismissed Because Plaintiff Has Not Sufficiently Alleged Damages.

Plaintiff asserts a claim for conversion (AC ¶¶ 173-179.) The elements of conversion under California law are: "(1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by wrongful act inconsistent with the property rights of the plaintiff; and (3) **damages**." *Baldwin v. Marina City Properties, Inc.*, 79 Cal. App. 3d 393 (Cal. Ct. App. 1978) (emphasis added); *Burlesci v. Petersen*, 68 Cal. App. 4th 1062 (Cal. Ct. App. 1998)); *see also American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1411 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 58 (1996).

As an initial matter, the notion that PayPal's act of temporarily suspending Plaintiff's money transfer (without paying interest) constituted conversion of Plaintiff's property is disingenuous at best. More importantly, however, Plaintiff has failed to allege any damages as a result of this suspended transfer, requiring dismissal of this claim. (AC ¶¶ 173-179.) First, Plaintiff concedes that PayPal returned to him the \$1,950 at issue. (AC ¶ 24.) Second, Plaintiff admittedly waived the right to any interest earned on the funds PayPal handled for him by

executing PayPal's User Agreement. (AC ¶ 58; *see n. 4, supra*, Doc. No. 21-3, RJN, Ex. A at 6). Having waived his right to any interest earned and assigned it to PayPal, Plaintiff did not have a property right to such interest, and PayPal could not have – as a matter of law – illegally converted property to which it had a legal right. *See Weiss v. Marcus*, 51 Cal. App. 3d 590, 599 (Cal. Ct. App. 1975) (of conversion requires action “inconsistent with rights” in the property); *Del Bino v. Bailey*, 197 F.3d 997, 1001 (9th Cir. 1999) (“in the absence of a property interest, . . . conduct could not constitute conversion.”); *Wanetick v. Mel's of Modesto, Inc.*, 811 F. Supp. 1402, 1409 (N.D. Cal. 1992) (where “Plaintiff neither owned nor had the right to possess” the funds in question,” Plaintiff “cannot demand such assets in a conversion action.”) In sum, Plaintiff has not alleged any damages both with respect to the principal of the transfer or any allegedly earned interest, and this claim should be dismissed as a matter of law.

D. Plaintiff's Claim for Tortious Inference (Eighth Cause of Action) Is Foreclosed by PayPal's User Agreement.

Plaintiff alleges tortious interference with a business relationship based on PayPal's alleged refusal to transfer Plaintiff's funds to Mr. Eric Anderson after Plaintiff provided PayPal with a copy of the contract between Plaintiff and Mr. Anderson. (AC ¶¶ 181-186.) Plaintiff alleges damages in the form of lost contract benefits or lost profits. (AC ¶¶ 181, 185.) However, as the Court already found, the limitation of liability in PayPal's User Agreement (RJN, Ex. A at 19) (§ 14.7 of User Agreement) “expressly limits PayPal's liability and “preclude[s] recovery of any lost profit or opportunity arising from Mr. Mehmet's use of PayPal's services.” (Order at 5-6.) Accordingly, this claim should be dismissed as a matter of law. (*See* Order at 5-6) (citing *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360 (9th Cir. 1987).)

E. Plaintiff's Cal. Bus. & Prof. Code. § 17200 Claim for “Unlawful, Unfair, and Fraudulent Practices” (Tenth Cause of Action) Sounds in Fraud and Should Be Dismissed for Failure to Plead Fraud with Particularity Required by Rule 9(b).

Plaintiff throws in a cause of action under Cal. Bus. & Prof. Code. § 17200 based on the same facts as Plaintiff's other fraud claims – alleged fraudulent concealment of the existence of “false positives.” (AC ¶ 196-199.) “Section 17200 claims that are grounded in fraud must satisfy the particularity requirements of Rule 9(b).” *Marcelos v. Dominguez*, No. C 08-00056 WHA,

1 slip op., 2008 WL 2788173, at *10 (N.D. Cal. July 18, 2008) (citing *Vess v. Ciba-Geigy Corp.*
 2 *USA*, 317 F.3d 1097, 1103 (9th Cir.2003) (applying Rule 9(b)'s pleading requirements for claims
 3 based in fraud to a Section 17200 claim)). Accordingly, this claim fails for lack of particularity,
 4 like Plaintiff's other fraud-based claims, as shown in Section III.A.1, *supra*. See *Parrish v.*
 5 *National Football League Players Ass'n*, 534 F. Supp. 2d 1081, 1093 (N.D. Cal. 2007).

6 **F. Plaintiff's RICO Claim (Eleventh Cause of Action) Is Grounded in Fraud and**
 7 **Should Be Dismissed for Failure to Plead Fraud with Particularity Under**
 8 **Rule 9(b).**

9 Plaintiff's RICO claim (Eleventh Cause of Action for violation of 18 U.S.C. § 1961) is
 10 expressly grounded in fraud. (AC ¶¶ 209, 210, 211, 218, 219.) Accordingly, the heightened
 11 pleading requirements of Rule 9(b) apply. See *Schreiber Distrib. v. Serv-Well Furniture Co.*, 806
 12 F.2d 1393, 1400 (9th Cir. 1986); see *Gabor v. County of Santa Clara Bd. of Supervisors*, No. C-
 13 07-04266-RMW-(HRL), slip op., 2008 WL 902407, at *4 (N.D. Cal. Mar. 31, 2008) (Whyte, J.)
 14 (dismissing a RICO claim where "it is . . . unclear even after numerous actions by plaintiffs
 15 alleging RICO violations what conduct is alleged to form the basis for plaintiffs' claim.").⁶

16 Under Rule 9(b), "conclusory allegations that defendant's conduct was fraudulent or
 17 deceptive are not enough." *Alfus v. Pyramid Technology Corp.*, 745 F. Supp. 1511, 1519 (N.D.
 18 Cal. 1990) (internal citations omitted); *Mazur v. eBay Inc.*, No. C 07-03967-MHP, slip. op., 2008
 19 WL 618988, at *13-*14 (N.D. Cal. July 25, 2008) (dismissing RICO and other fraud-based
 20 claims for lack of particularity under Rule 9(b)). Here, Plaintiff's conclusory assertion that
 21 PayPal "devised" a "fraudulent scheme" to hide the alleged "false positives" produced by its
 22 fraud management system in order to "reap[] financial benefit" from interest earned on such
 23 suspended transfers (AC ¶¶ 209-221) falls well short of meeting the exacting pleading
 24 requirements of Rule 9(b).⁷ See *Moore v. Kayport Package Express*, 885 F.2d 531, 541 (9th Cir.
 25 1989) (to satisfy Rule 9(b), "[a]llegations of fraud under section 1962(c) 'must identify the time,

26 ⁶ See also *United Centrifugal Pumps v. Schotz*, No. C-89-2291-FMS, 1991 U.S. Dist. LEXIS
 27 21100 (N.D. Cal. June 12, 1991).

28 ⁷ In fact, Plaintiff's alleged misrepresentations about "fabricated good cause" (AC ¶ 206), which
 form the basis of its RICO claim, are squarely contradicted by the plain language of the User
 Agreement which, as discussed in Section III.A.1., *supra*, contains no such representation about
 "good cause."

place, and manner of each fraud plus the role of each defendant in each scheme.’’). Accordingly, Plaintiff’s formulaic recitations of the elements of RICO – without alleging specific facts in support of its massive “fraudulent scheme” theory – violates the particularity mandate of Rule 9(b). *See Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. Cal. 2001) (Rule 9(b) is not satisfied by plaintiff’s allegations that defendant “concealed the fraudulent submission of false claims . . . to avoid repayment of funds. . .”); *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965-66 (2007) (“labels and conclusions, and a formulaic recitation of the elements of a cause of action will not” survive a motion to dismiss).

IV. CONCLUSION

Plaintiff’s improbable theory of massive fraud supposedly perpetrated by PayPal based on the alleged concealment of “false positives” is not supported by specific facts, falling short of the particularity requirements of Rule 9(b). Accordingly, Plaintiff’s claims that are based on or sound in fraud should be dismissed. Further, Plaintiff’s remaining claims should be dismissed for failure to allege any specific false misstatement and damages.

Therefore, for all the foregoing reasons, the First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Causes of Action of Plaintiff’s Complaint should be dismissed pursuant to Rules 12(b)(6) and 9(b).

Dated: August 22, 2008

COOLEY GODWARD KRONISH LLP
MICHAEL G. RHODES (116127)
OLEG CROSS (246680)

/s/

Oleg Cross
Attorneys for Defendant
PAYPAL, INC.

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8 Attorneys for Defendant
9 PAYPAL, INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13 B. DAVID MEHMET,

14 Plaintiff,

15 v.

16 PAYPAL, INC.,

17 Defendant.

Case No. 5:08-cv-01961-RMW

**DECLARATION OF OLEG CROSS IN
SUPPORT OF MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(B)(6)
AND 9(B)**

DATE: September 26, 2008
TIME: 9:00 a.m.
CTRM: 6, 4th Floor
JUDGE: Hon. Ronald M. Whyte

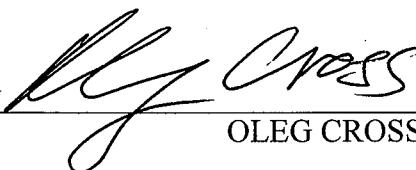
1 I, Oleg Cross, declare as follows:

2 1. I am an associate with the law firm of Cooley Godward Kronish LLP, attorneys for
3 Defendant PayPal Inc. ("PayPal") in the above-captioned action. I submit this declaration in
4 support of PayPal's Motion to Dismiss Pursuant to Rules 12(b)(6) and 9(b). I am fully familiar
5 with the facts set forth herein and, if called as a witness, would competently testify thereto.

6 1. On August 12 and 20, 2008, I conducted a telephonic conversation with B. David
7 Mehmet, Plaintiff in the above-captioned action. In that conversation, Mr. Mehmet and I agreed
8 on the noticed date and time of the hearing for this motion.

9 I hereby declare under penalty of perjury under the laws of the United States and the State
10 of California that the foregoing is true to the best of my knowledge.

11
12 Dated: August 22, 2008

13
14 
OLEG CROSS

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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION
11

12 B. DAVID MEHMET,

13 Plaintiff,

14 v.

15 PAYPAL, INC.,

16 Defendant.
17

Case No. 5:08-cv-01961-RMW

**[PROPOSED] ORDER GRANTING MOTION
TO DISMISS PURSUANT TO FED. R. CIV.
P. 12(B)(6) AND 9(B)**

CTRM: 6, 4th Floor
JUDGE: Hon. Ronald M. Whyte

18 The motion of Defendant PayPal, Inc. ("PayPal") to dismiss Plaintiff's Verified Amended
19 Complaint ("Complaint") was heard on September 26, 2008 at 9:00 a.m. in this Court. PayPal,
20 appearing by counsel, and Plaintiff, *pro se*, were in attendance and presented oral arguments.
21 Having considered the parties' papers filed in support of and in opposition to the motion, oral
22 argument, and other pleadings and papers on file herein, the Court grants PayPal's motion to
23 dismiss First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Causes of Action of
24 Plaintiff's Complaint for failure to state a claim pursuant to Federal Rules of Civil Procedure
25 12(b)(6) and 9(b).
26
27
28

1 Accordingly, good cause appearing, **IT IS HEREBY ORDERED THAT:**

2 (a) PayPal's motion to dismiss is granted; and

3 (b) The First, Second, Third, Fourth, Seventh, Eighth, Tenth, and Eleventh Causes of
4 Action of Plaintiff's Complaint are dismissed.

5 **IT IS SO ORDERED.**

6
7
8 Dated: _____

9 Honorable Ronald M. Whyte
United States District Judge

PROOF OF SERVICE**(FRCP 5)**

I am a citizen of the United States and a resident of the State of California. I am employed in San Diego County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is Cooley Godward Kronish LLP, 4401 Eastgate Mall, San Diego, California 92121. On the date set forth below I served the documents described below in the manner described below:

1. **DEFENDANT PAYPAL, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6) AND 9(B); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**
2. **DECLARATION OF OLEG CROSS IN SUPPORT OF MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6) AND 9(B)**
3. **[PROPOSED] ORDER GRANTING MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(B)(6) AND 9(B)**



(BY U.S. MAIL) I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Diego, California.



(BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.



(BY FACSIMILE) I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.



(BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by _____ for overnight delivery.



(BY ELECTRONIC MAIL) I am personally and readily familiar with the business practice of Cooley Godward Kronish LLP for the preparation and processing of documents in portable document format (PDF) for e-mailing, and I caused said documents to be prepared in PDF and then served by electronic mail to the parties listed below.

on the following part(ies) in this action:

1 B. David Mehmet
2 130 Church Street, Suite 251
3 New York, NY 10007

4 Executed on August 22, 2008, at San Diego, California.

5 
6 Jackie Foglio